No. 9401.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

P. M. JACKSON, Trustee in Bankruptcy for the Estate of Leonard J. Woodruff, a bankrupt,

Appellant,

vs.

E. A. LYNCH, Receiver in Bankruptcy of the Estate of Leonard J. Woodruff, alleged bankrupt,

Appellee.

BRIEF OF APPELLEE.

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TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

CASES. PAGE

Statutes.

Text Books and Encyclopedias.

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Appellee.

BRIEF OF APPELLEE.

Statement of the Facts.

Leonard J. Woodruff, the bankrupt, is a judgment debtor of M. E. Heiser. Heiser obtained a judgment in the District Court of the Southern District of California for a total of $278,000.00 against said Woodruff in an action entitled *Heiser v. Woodruff*. Concerning that case this Court is now familiar as it is now before this Circuit Court on an abortive attempt to appeal from the final judgment in that case.

Heiser, through his counsel, stipulated to a stay of execution on that judgment, the stay to run to July 6, 1939. Woodruff had been strenuously asserting that sub-

stituted service of process on him in California was defective because, he asserted, his residence had been and was at 2446 Inverness avenue, Los Angeles, California, and that he was away from his home only temporarily to buy cattle in the state of Oklahoma. The day before the stay of execution expired, to wit, on July 5, 1939, Woodruff appeared at Muskogee, Oklahoma, and filed his voluntary petition in bankruptcy, alleging that his principal place of business for the greater part of the preceding six months was Carter county, Oklahoma. [Tr. p. 66.] He did not claim residence or domicile in Oklahoma. He filed his schedules in bankruptcy in Oklahoma and DID NOT list his California properties.

The California properties of the bankrupt Woodruff were extensive, consisting principally of a business block located at Los Angeles, on Hollywood boulevard, for which he had paid $225,000.00 [Tr. p. 29], and a set of four antique stores housed on said premises stocked with antiques, oriental goods, Indian goods, medieval arms [Tr. p. 29], which were appraised in this proceeding as of the value of $84,000.00, and a stock of raw sapphires and opals in warehouse.

There was no inventory of any kind of said Los Angeles antique stores or of the raw gems valued at $30,000.00.

There was no insurance on either said real or personal properties.

No receiver was appointed by the Oklahoma District Court.

No receiver or trustee from Oklahoma appeared in California to preserve, claim, inventory, insure or care for the California properties until P. M. Jackson, Trustee, from Oklahoma, appeared in this proceeding with his mo-

tion to vacate for the first time on November 17, 1939—more than four months after E. A. Lynch, Receiver, was appointed receiver by the California District Court, and had done all his work and made all his expenditures.

On application of the petitioning creditor in the District Court of the Southern District of California, Judge William P. James at Los Angeles made his order appointing E. A. Lynch as receiver, Judge James being then advised of the bankruptcy proceeding of Woodruff in Oklahoma. [Tr. p. 67.] By the order of his appointment, Lynch was charged with preserving, insuring and operating the properties of the bankrupt, and particularly the stores of the bankrupt at Los Angeles known as Woodruff Antique Stores.

The question of which court is primary, and which is secondary, is still undetermined, as an attack was made by creditors upon the jurisdiction of the Oklahoma court and likewise by creditors upon the order under General Order No. 6 as made by the Oklahoma court, and both of these questions are now on appeal before the Circuit Court of Appeals for the Tenth Circuit, being known and docketed in said circuit as No. 2024. [Tr. p. 66, subdivisions 1 to 16.]

The residence, the domicile and the principal place of business of Woodruff were at Los Angeles, in the Southern District of California. The principal and only place of business of the bankrupt, creditors contend, was the place on Hollywood boulevard, Los Angeles, California, the site of the antique stores, investments in buildings, personal properties, and so forth, of a value in excess of $300,000.00. [Tr. p. 29.] There being no inventory of any kind of these extensive antique stores—some 25,000

separate articles, some genuine antiques and oil paintings, some reproductions, some imitations—and no insurance thereon. On application of the California receiver, E. A. Lynch, the District Court for the Southern District of California, by the Honorable Paul J. McCormick, Judge, made an order for the examination of the bankrupt Woodruff in the Eastern District of Oklahoma. The California receiver, E. A. Lynch, then sent one of his local counsel, Rupert B. Turnbull, to Oklahoma to obtain information from the bankrupt by the examination of the bankrupt.

The Referee in Bankruptcy in Oklahoma refused permission to examine the bankrupt and E. A. Lynch reported such situation to the District Judge in California, the Honorable Paul J. McCormick, by an additional petition for instructions as follows:

> "Comes now E. A. Lynch, as receiver of the estate of Leonard J. Woodruff, a bankrupt, and respectfully shows to the Court:
>
> 1. That your petitioner, E. A. Lynch, is the duly appointed, qualified and acting receiver of the estate of Leonard J. Woodruff in the Southern District of California, having been appointed by an order of this court dated July 14, 1939.
>
> 2. That as receiver your petitioner has taken into actual possession, and is in possession of, a store building situated at the juncture of Hollywood Boulevard and Sunset Boulevard, which your petitioner alleges he was informed was purchased by the bankrupt at the cost of approximately $225,000.00. That your petitioner as such has taken possession of the stock in trade of merchandise in four stores located in said building known as Woodruff Antique Stores, consisting of, first, general stock of antiques, repro-

ductions and imitations, pictures, prints, coppers, etc.; second, a stock of Oriental goods; third, a stock of Indian goods and Indian baskets, saddles, etc.; fourth, stock of firearms and a collection of medieval arms and objects of warfare.

There is in existence no inventory of said stock, which are very extensive. That there is no memorandum or books from which it can be ascertained what the cost of said merchandise was, or of its present value. The property was not insured at the time of bankruptcy and your petitioner has been uncertain as to the amount of [24] insurance to be placed thereon, but has covered it for fire loss purposes at the present time in the amount of $30,000.00. That your petitioner has no inventory and so notified the insurance companies carrying said fire loss insurance policies.

That your petitioner has heretofore petitioned this court for authority to instruct one of his counsel to examine the bankrupt concerning the nature, extent and value of the properties reduced to possession by your receiver, and pursuant to an order made by this court in that behalf your receiver has caused Rupert B. Turnbull, one of his counsel, to proceed to Ardmore, Oklahoma, for the examination for the purpose of obtaining information from the bankrupt by examination to be conducted before the referee in bankruptcy, the Honorable George F. Clark. That a bankruptcy proceeding is pending in the Eastern District of Oklahoma relating to the same bankrupt herein, Leonard J. Woodruff, and the matter has been referred, both specially and generally, as referee and special master, to the Honorable George F. Clark, sitting at Ardmore, Carter County, Oklahoma. That Rupert B. Turnbull did proceed to Ardmore, Oklahoma, and appeared on behalf of your receiver and

one of his attorneys, before the Honorable George F. Clark, referee in bankruptcy, sitting in the District Courtroom in the Federal Building, at Ardmore, Oklahoma, on Friday, the 11th day of August, 1939. That at said time the said bankrupt, Leonard J. Woodruff, was present. Said Rupert B. Turnbull having theretofore communicated with the said referee in bankruptcy requested the production of the bankrupt at such time. That at such time and upon the calling of the Court at 1:30 P. M. on the 11th day of August, 1939, substantially, but not verbatim, the following occurred:

By Mr. Turnbull: May I proceed?

By the Court: Yes.

By Mr. Turnbull: My name is Rupert B. Turnbull and I represent to the Court at this time that there is pending in the Southern District [25] of California, in the District Court at that place, an involuntary proceeding against Leonard J. Woodruff. In that proceeding the Court has made its order appointing E. A. Lynch as receiver. In support of that statement I hand your Honor herewith a certified copy of the order appointing E. A. Lynch as receiver. (Thereupon there was handed to the Court a certified copy of the order made by this court appointing E. A. Lynch receiver.) I represent to your Honor that I am one of the attorneys employed by that receiver, E. A. Lynch, pursuant to an order of that court. I hand you herewith in support of that statement a copy of the order of the District Court of Southern District of California, authorizing such employment. I represent to your Honor that I now appear as the attorney for said receiver, E. A. Lynch, and pursuant to an order of the District Court of the Southern District of California authorizing E. A. Lynch to

instruct me to appear here and examine Leonard Woodruff concerning the nature, extent and value of the property in the Southern District of California, and for the purpose of properly preserving, inventorying and insuring that property adequately, I ask the privilege of examining the said Leonard Woodruff at this time for the limited purpose as I have stated.

That at said time Leonard Woodruff was in the courtroom available for such examination. That at such time he was represented by his counsel, Champion, Champion and Fischel. That Louis Fischel arose and addressed the Court on behalf of the bankrupt and stated to the Court that the receiver in the California Court was an interloper, had no rights before the Oklahoma Courts, and that this, the District Court for Eastern Oklahoma, should refuse him any rights of examination of the bankrupt for any purposes. Thereupon Rupert B. Turnbull, acting as attorney for E. A. Lynch, stated to the Court, truthfully, that the receiver in California was in a very uncomfortable position in that he had been ordered by the District Court in Southern California to merger, preserve and insure [26] the property. That he thought he was entitled to the aid of the bankrupt and the knowledge of the bankrupt concerning the nature, extent and value of these antiques and other collections, and also with respect to other property which had been located by the receiver, which property belonged to the bankrupt, which is not inventoried in the bankrupt schedules as filed in the District Court in the Eastern District of Oklahoma. Thereupon the court sustained the objection of counsel for bankrupt and refused permission to Rupert B. Turnbull, acting as attorney for the receiver, E. A. Lynch, to examine the bankrupt, Leonard J. Woodruff, notwithstanding that he was personally present at the Court at the said time." [Tr. pp. 29-33 incl.]

The trustee appointed by the Oklahoma court is the official who now challenges the right of the California District Court to require, for approval or disapproval, the report and account of his own receiver, E. A. Lynch; that Trustee P. M. Jackson is the official who left uninsured, uninventoried and unprotected extensive properties of the bankrupt, real and personal, of a value in excess of $300,000.00, and all on the ground that they were not scheduled in the Oklahoma bankruptcy proceeding.

The Oklahoma District Court on October 16, 1939, made its order under General Order No. 6 determining that, there being two district courts having jurisdiction of the bankrupt's properties—one in the Southern District of California and one in the Eastern District of Oklahoma—that

> "this court can proceed with the administration of the bankrupt's estate with the greatest convenience to the parties interested in said estate." [Tr. p. 41.]

And also:

> "The Court further finds that on the 13th day of July, 1939, M. E. Heiser, one of the creditors of bankrupt, filed an involuntary petition in bankruptcy in the United States District Court for the Southern District of California, Central Division, being cause No. 34521-J in Bankruptcy therein and that E. A. Lynch was appointed receiver in said action and is now acting as such receiver; that said proceeding should be transferred to this Court and this judicial district and should be *consolidated* with this case and that the trustee should take charge of all of the property of the bankrupt including that located in California." [Tr. p. 41.]

Upon transmittal of that order under General Order No. 6, as made by the Oklahoma court, the District Court for the Southern District of California DID NOT defy the order of the Oklahoma court, but instead it merely made its order directing the clerk to delay the transmission of its own California records to Oklahoma until after the District Court of the Southern District of California could promptly obtain an account and report of its own receiver, E. A. Lynch, and that order directed the said receiver to file within five days his report and account, as appears from said order which appears in its entirety in the record herein. [Tr. pp. 43-46 incl.] It is the refusal of the California court to vacate that order that results in the present appeal by the appellant herein.

The memorandum of order by the District Judge for the United States District Court, Southern District of California, justifying his refusal to vacate that order, appears in the record herein [Tr. pp. 51-55 incl.] and reads as follows:

> "In the Matter of Leonard J. Woodruff, Alleged Bankrupt.
>
> MEMORANDUM OF ORDER.
>
> Cosgrave, District Judge.
>
> Leonard J. Woodruff was adjudicated a bankrupt on his voluntary petition therefor in the Eastern District of Oklahoma on July 5, 1939, and P. M. Jackson since has been appointed trustee of the bankrupt estate. On July 13, 1939, an involuntary petition seeking the adjudication of Leonard J. Woodruff as

a bankrupt was filed in the Southern District of California. On petition setting up legal necessity therefor, E. A. Lynch was appointed receiver under the involuntary petition by the California court, and authorized to employ counsel. A considerable amount of real, as well as personal property, the latter being an extensive store for the sale and rental of antiques, was located in California, and the receiver was authorized to operate this business.

On October 16, 1939, the court in Oklahoma, acting under General Order in Bankruptcy No. 6, after application therefor and hearing on such application, found the Eastern District of Oklahoma to be the domicile of the bankrupt during the required period, and also found it to be the principal place of business of the bankrupt, and because of these and other entirely sufficient reasons, that court found that it is the court which can proceed with the administration of the bankrupt's estate with the greatest convenience to the parties interested. The court then by its decree adjudged accordingly, and by its order transferred the case pending in the Southern District of California to the Eastern District of Oklahoma, and consolidated it with the case pending in the last named district.

Mr. Lynch, the receiver in California, does not question [42] the effectiveness of the decision of the Oklahoma court, since it was the first to acquire jurisdiction, but he insists that this court must settle his account as receiver before the case is transferred. Immediately after the filing in the office of the Clerk

of this court of a certified copy of the decree of the Oklahoma court, Mr. Lynch procured an ex parte order delaying the execution of the decree of the Oklahome court until his said account is settled. Mr. Jackson, trustee in the Oklahoma proceeding, now moves this court to set aside its order staying the transfer of the case, and instead to order such transfer forthwith. The question presented, therefore, is whether this court has jurisdiction and duty to settle the account of the California receiver before the case is transferred to the Eastern District of Oklahoma.

The involuntary petition filed in California alleges that the residence, domicile, and principal place of business of the bankrupt is in this district. The Oklahoma court finds that the domicile and principal place of business of the bankrupt is in the Eastern District of Oklahoma.

It is plain that the California court is not without jurisdiction in the premises. The District Court may:

'adjudge persons bankrupt who have had their principal place of business, resided or had their domicile within their (the court's) respective territorial jurisdiction for the preceding six months.' Bankruptcy Act 2, a (1).

In fact, the order of the Oklahoma court presumes this to be the case for that order is based on General Order No. 6:

'If two or more petitions are filed by or against the same person * * * in different courts, EACH OF WHICH HAS JURISDICTION * * * etc.'

which General Order is itself based on Section 32 of the Bankruptcy Act (11 U. S. C. 55):

'In the event petitions are filed by or against the same person * * * in different courts of bankruptcy, EACH OF WHICH HAS JURISDICTION, the case shall, by order of the court first acquiring jurisdiction, be transferred to and consolidated [43] in the court which can proceed with the same for the greatest convenience of parties in interest.'

It was a matter of uncertainty at the time that the involuntary petition was filed in California in which jurisdiction the administration of the estate finally would be had.

It is true that the California proceeding is not ancillary to that in Oklahoma (Bankruptcy Act, 2, a (20), 69, c, General Order 51) within the meaning of the Bankruptcy Act.

The action here invoked by the California receiver is not in the administration of the bankrupt estate as such. It must be assumed that on the showing made in his petition this court exercised a sound discretion in the appointment of a receiver. Plainly, it was a part of prudence to insure the property and keep it intact. A duty is imposed on every court, having property in its possession, to preserve the same and to control and to compensate its own officers in the performance of their duties with respect to such property.

The motion of Mr. Jackson must be denied, and it is so ordered.

November 15, 1939.

[Endorsed]: Filed Nov. 15, 1939. [44]"

The District Court for the Southern District of California Properly Exercised Its Jurisdiction Over Property of the Bankrupt Within Its Territorial Limits, Which Property Was Not Scheduled by the Bankrupt in His Voluntary Oklahoma Proceedings.

Under the Bankruptcy Act the bankrupt can be adjudicated in the place where he has either his residence, his domicile, or his principal place of business.

> "A district court of the United States, sitting as a court of bankruptcy, is a court of limited jurisdiction. Limitations exist as to subject matter; as to territory; as to residence and occupation of the debtor to be adjudicated: * * * and consent cannot confer jurisdiction over subject matter. The express provisions of the statute and necessary implication are controlling."
>
> *Nixon v. Michaels,* 38 Fed. (2d) 420.

> "He was a sojourner merely, and not a resident, of East St. Louis. We look upon this transaction as an imposition upon the jurisdiction of the court. The Congress did not intend *that one may select any court of bankruptcy which he pleases in these broad United States,* and be enabled, through a pretentious removal to the district of that court, to obtain his discharge from his debts. To allow that to be done would open the door to grave frauds upon creditors, which we are not disposed to countenance." (Italics ours.)
>
> *In re Garneau,* 11 A. B. R. 679, 127 Fed. 677 (C. C. A., Ill.), cited by *Remington on Bankruptcy,* Vol. 1, p. 71; also citing *In re Sutter,* 46 A. B. R. 267, 270 Fed. 248.

Creditors may interpose jurisdictional questions in a voluntary bankruptcy and after adjudication.

See:

In re San Antonio Land Co., 36 A. B. R. 512, 228 Fed. 984;

In re Guancevi Tunnel Co., 29 A. B. R. 229, 201 Fed. 316 (C. C. A., N. Y.);

In re Waxelman, 3 A. B. R. 395, 98 Fed. 589;

Niagara Contracting Co., 11 A. B. R. 645, 127 Fed. 782;

German v. Franklin, 9 Sup. Ct. Rep. 159, 128 U. S. 52, 32 L. Ed. 519;

Nixon v. Michaels, 38 Fed. (2d) 420, 15 A. B. R. (N. S.) 489 (C. C. A., Mo.).

The alleged bankrupt cannot confer jurisdiction upon a court not having jurisdiction of the subject matter or of the person.

> "But assuredly, neither consent nor waiver can confer jurisdiction in the bankruptcy court of one district to adjudge bankrupt a debtor not resident, domiciled nor having his principal place of business therein, although the ascertainment of such jurisdictional fact must be left in the same court for determination and its determination may not be subject to collateral attack."
>
> *Remington on Bankruptcy,* Vol. 1, p. 72.

The bankruptcy court has jurisdiction to determine whether the debtor belongs to the class subject to bankruptcy in that jurisdiction.

> "No one may be adjudged bankrupt upon his own petition or upon the petition of another, by his own

consent or contrary thereto, except by the bankruptcy court of the district where he has had either his residence, domicile or principal place of business for the six months, or for the greater portion thereof, preceding the filing of the petition."

Statement from the text of *Remington on Bankruptcy,* Vol. 1, p. 75, and citing:

In re Williams, 9 A. B. R. 736;

In re Mitchell, 33 A. B. R. 463;

In re Elmire Steel Co., 5 A. B. R. 485;

In re Garneau, 11 A. B. R. (C. C. A., Ill.).

"An established domicile is presumed to continue down to the filing of the petition, in the absence of proof to the contrary. These limitations as to residence, domicile and principal place of business are jurisdictional, pertaining to jurisdiction over the subject matter; and they cannot be waived."

Remington on Bankruptcy, Vol. 1, p. 76, citing authorities heretofore quoted.

The District Court for the Southern District of California exercised its jurisdiction over property of the bankrupt within its territorial jurisdiction limits: (1) Because a bankruptcy proceeding purporting to be a primary petition had been filed in its jurisdiction; (2) by the order of Judge James appointing a receiver for the California properties; (3) by an order of Judge McCormick ordering the receiver to examine the bankrupt in Oklahoma in aid of the proceedings in California; (4) by the order of Judge Cosgrove staying the transmittal of the California proceeding records to Oklahoma *only* until the California court should obtain the report and account of its own receiver, to wit, the appellee E. A. Lynch.

The latter delay was necessary to determine what property said receiver had reduced to possession in California, to approve or disapprove the correctness of the receiver's account and expenditures, and to provide for the receiver's compensation rather than send him back two thousand miles to Oklahoma to have his account settled and allowed

In no other manner could the judges of the California District Court control their own officers, the Receiver E. A. Lynch being only "the long arm of the court" by and through which the court acts.

The Jurisdiction in This Case Is Either Primary or Ancillary. If Primary, the Following Applies:

In June, 1910, Congress amended the Bankruptcy Act so that it read that the district courts

> "are hereby invested within their respective territorial limits as now established or as they may be hereafter changed with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings in vacation, in chambers, and during their respective terms, as they or now or may hereafter be held. * * *"

In the case of *Babbitt v. Dutcher*, 216 U. S. 101, Chief Justice Fuller delivered the opinion of the court and quoted with approval the opinion of Justice Bradley in the case of *Sherman v. Bingham* (Supreme Court) as follows:

> " 'Their jurisdiction is confined to their respective districts, it is true, but it extends to all matters and proceedings in bankruptcy without limitation. When the act says that they shall have jurisdiction in their respective districts, it means that the jurisdiction is exercised in their respective districts, each court with-

in its own district may exercise the powers conferred; but those powers extend to all matters of bankruptcy without limitation. There are, it is true, limitations elsewhere in the act, but they affect only the matters to which they relate. * * *'

"But the exclusion of other district courts from jurisdiction of these proceedings does not prevent them from exercising jurisdiction in matters growing out of or connected with that identical bankruptcy so far as it does not trench upon or conflict with the jurisdiction of the court in which the case is pending. * * * That the courts of such other districts may exercise jurisdiction, in such cases, would seem to be the necessary result of the general jurisdiction conferred upon them, and is in harmony with the scope and design of the act."

Babbitt v. Dutcher, supra.

If the Jurisdiction in This Case Is Ancillary, the Following Applies:

The amendment in 1910 above referred to continued, under section 2, subdivision 20, that the courts are invested within their respective territorial limits to

"exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy."

U. S. Compiled Statutes 1901, p. 3420, as amended by Act June 25, 1910; *U. S. Compiled Statutes* Supp. 1911, p. 1491.

A District Court May Not Exercise Its Power Outside Its Respective Territorial Limits.

In the case of *Fidelity Trust v. Gaskell,* 195 Fed. 865, at page 871, the Court said:

> "Moreover, it seems to be settled by the decisions in Babbitt v. Dutcher, and other cases, that the limitation of section 2 of the Bankruptcy Act of the jurisdiction granted to the district courts in bankruptcy to 'their respective territorial limits' restricts the exercise of the power of a district court in which a petition in bankruptcy is filed to its own district, and that it may not enforce its process or its order for the delivery of property without the territorial limits of its district."

Citing:

Lathrop v. Drake, 91 U. S. 516, 517, 23 L. Ed. 414;

Babbitt v. Dutcher, 216 U. S. 102, 110, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969;

Staunton v. Wooden, 179 Fed. 61, 64, 102 C. C. A. 355;

In re Peiser (D. C.), 115 Fed. 199, 200;

In re Sutter Bros. (D. C.), 131 Fed. 654;

In re Benedict (D. C.), 140 Fed. 55;

In re Robinson (D. C.), 179 Fed. 724.

> "It is therefore no longer true that one court, the court making the adjudication in bankruptcy, takes exclusive jurisdiction and alone collects and determines the titles to and liens upon the property wherever situated claimed as part of the estate of the bankrupt."

Fidelity Trust v. Gaskell, supra.

"A proceeding in bankruptcy is a proceeding in equity, and a district court sitting in bankruptcy, whether it is exercising its primary or its ancillary jurisdiction, is a court of equity. It is an established principle of equity jurisprudence that whenever a court of chancery takes into its legal custody, and thereby withdraws and withholds property from replevin, attachment, or other legal proceedings, it hears and adjudges the claims to the title and the legal and equitable liens upon that property of all parties who intervene in the suit or proceedings before it, in their own behalf, and submit their claims to its adjudication."

Fidelity Trust v. Gaskell, supra.

The *Chandler Act,* effective September 22, 1938, definitely determined the controversy, if any, that existed prior to that date concerning the duties and powers of ancillary jurisdiction. Prior to the enactment of this act, there was a difference of opinion among the district and the circuit courts as to the right of the ancillary courts to sell assets, fix fees, and pay expenses of the ancillary estate; and prior to this act the weight of respectable authority was that the ancillary court *did have* such authority. The Chandler Act definitely settles the controversy and fixes upon the ancillary court the *duty* and the *right so to do.*

Section 2a, subdivision (20), reads:

"Exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bank-

> ruptcy proceedings pending in any other court of bankruptcy: Provided, However, That the jurisdiction of the ancillary court over a bankrupt's property which it takes into custody shall not extend beyond preserving such property and, where necessary, conducting the business of the bankrupt, and reducing the property to money, paying therefrom such liens as the court shall find valid and the expenses of ancillary administration, and transmitting the property or its proceeds to the court of primary jurisdiction; and * * *"

In *Elkins, Petitioner in the Matter of Madison Steele Co., Bankrupt,* 216 U. S. 115 (C. C. A., 2d Circuit), the Court ends its decision with the following answer to its own question:

> "Have the respective district courts of the United States sitting in bankruptcy ancillary jurisdiction to make orders and issue process in aid of proceedings pending and being administered in the district court of another district? On the authority of Babbitt v. Dutcher, just decided (216 U. S. 102, *ante* 402, 30 Supreme Court Reps. 372), we answer both questions in the affirmative and it will be so certified."

That decision held that a district court under its primary jurisdiction can do all, each and every act under the Bankruptcy Act with respect to persons and property of the bankrupt within its jurisdiction, even though another bankruptcy of such person is pending in another district.

Ancillary Jurisdiction Does Not Depend Upon Any Statute but Rests on Possession of the Property Within the Territorial Jurisdiction of the Court.

"In the courts of the United States this ancillary jurisdiction may be exercised though it is not authorized by any statute. The jurisdiction in such *cases arises out of possession of the property,* and is exclusive of the jurisdiction of all other courts although otherwise the controversy would be cognizable in them. *Murphy v. John Hoffman Co.,* 211 U. S. 562, 569."

Butler v. Ellis, 45 Fed. (2d) 951, at p. 953.

"There the rule is no different, we think, in bankruptcy proceedings where the court of ancillary jurisdiction is proceeding under the bankruptcy statute. The leading case on the subject is Fidelity Trust Company v. Gaskell (C. C. A. 8th), 195 Fed. 865, 871, in which the late Judge Sanborn went into the matter very fully and stated the rule applicable as follows: 'A proceeding in bankruptcy is a proceeding in equity, and a district court sitting in bankruptcy, whether it is exercising its primary or its ancillary jurisdiction, is a court of equity. It is an established principle of equity jurisprudence that whenever a court of chancery takes into its legal custody, and thereby withdraws and withholds property from replevin, attachment, or other legal proceedings, it hears and adjudges the claims to the title and to legal and equitable liens upon the property of all parties who intervene in the suit, etc. . . .'"

Butler v. Ellis, supra.

This case of *Butler v. Ellis, supra,* being a decision in the Circuit Court of Appeals for the Second Circuit, directly decided the following matters:

First, that a district court could seize and had seized property of the bankrupt, which property was within the court's territorial jurisdiction;

Second, that that court had jurisdiction to determine the liens against the property within its jurisdiction, and had jurisdiction to fix the amount of allowance for compensation to its receiver and to the attorneys for its receiver;

Third, that the court could order the sale of sufficient of the property within its territorial jurisdiction to pay such claims, liens, fees and costs of administration.

The Court in its opinion said:

> "It is unthinkable that in authorizing the district courts to exercise ancillary jurisdiction in aid of a receiver or trustee in bankruptcy appointed in another jurisdiction, it was intended that these courts should do no more than seize property designated by the officer of the foreign court, and without hearing those who claim the property or an interest therein, turn it over to be administered in a jurisdiction hundreds of miles removed from the residence of the claimants. The first duty of the court is to do justice; and it is manifest that when through its receiver it lays its hands on property and thus renders it impossible for any other court to determine the ownership thereof or of the right of property therein, justice requires that it should itself hear and pass upon the claims of those who assert that the property belongs to them and not to the bankrupt.
>
> *Butler v. Ellis, supra.*

"On the third question, however, we think that the learned judge below was in error in confirming a sale of the property and in allowing fees to the receiver and attorneys, without giving notice to creditors or observing the limitations on allowance prescribed by the Bankruptcy Act. * * * And the case will be remanded to the end that notice may be given to creditors of the sale, and proposed confirmation and the application of receiver, commissioner, and counsel for allowance. The court need not order a resale of the property unless after notice to creditors it shall appear that the amount of the bid is grossly inadequate. * * * In making allowances, the limitation of statute referred to and the requirement of General Order No. 42 should be observed."

Butler v. Ellis, supra.

In the case of *In re Einstein,* 245 Fed. 189, at 194, the Court in its opinion said:

"It seems to me this reduces the question in issue to the proposition: Has this court the ancillary jurisdiction or power to establish and declare the existence of this lien, direct its payment from the proceeds of such sale, and also the legitimate expenses of the receiver, and direct the payment of the balance to the trustee in Florida? *Or* must this court, having determined that the proceeds of such sale belong to the estate in bankruptcy of Robert Einstein, direct the payment of the funds to the trustee in Florida and relegate the Gurnsey B. Williams Company and the receiver to the court of bankruptcy in Florida? The amendments of 1910 to the bankruptcy law confer ancillary jurisdiction on courts of bankruptcy where property of the bankrupt may be found. *Fidelity Trust Co. v. Gaskell* (109 Fed. 865) (also citing additional authorities). * * * It seems clear that it

would be unjust for a court in bankruptcy, having the actual possession of the property with different claimants thereto residing in its jurisdiction, to send the property to some other district, it might be thousands of miles distant, and relegate the parties to that court."

Authority to Fix Compensation of Receiver and Attorney for Receiver.

In the case of *In re Isaacson* (C. C. A. 2d), reported in 174 Federal Reporter at 406, a petition in involuntary bankruptcy was filed in the Southern District of New York, and a receiver was appointed; the receiver took possession of two places of business of the bankrupt; thereafter a petition in bankruptcy against the same bankrupt was filed in another district, and adjudication followed.

An order was made under General Order No. 6, by which the proceedings were ordered transferred to the jurisdiction last in point of time. Petitions were presented to the First District Court for allowances for the receiver and his attorneys, to wit, the receiver first appointed, and for the allowance of the accounts of the receiver first appointed. It was contended there was legal error in the first court's fixing the amount of allowance and directing payment thereof. The question of jurisdiction was raised, and the opinion in that case reads:

> "We cannot assent to the proposition that the court which appointed the receiver and for which his services were rendered has not jurisdiction to examine into the nature and extent of those services, and to determine what is a proper compensation therefor. Technically, that court has no jurisdiction to order the receivers appointed *by another court* to make dis-

bursements out of the fund in their hands, and in that particular the order of October 27, 1908, is modified; but the bankruptcy court in the Eastern District will undoubtedly give full faith and credit to the determination of the court in the Southern District as to the value of the services rendered by an officer of that court to that court, and will instruct its own receivers accordingly. * * *" (With the modifications above indicated, the order is there affirmed.) (Italics ours.)

In re Isaacson, supra.

In *Fidelity Trust Co. v. Gaskell,* 195 Fed. 865, at page 874, the Court says:

"The suggestion that such a court may not fix and pay the compensation and expenses of its receiver out of the proceeds of the property he seizes and converts into money under its direction, because the amendment of Section 2 of the Bankruptcy Law or the Act of June 25, 1910, provides that notice to creditors shall be given before the compensation of the receiver shall be fixed, loses its force when it is considered that by the same Act notice to creditors of the sale of the property of a bankrupt's estate is also required to be given. (36 Stats. 412, Secs. 9 and 9½, page 841.) And while this question is not here for adjudication in this case, we are unwilling by silence to intimate any assent to a rule that a court appointing a receiver in the exercise of its ancillary jurisdiction in bankruptcy has not preliminary power to pay the compensation and its legitimate expense out of any funds in its hands belonging to the estate of the bankrupt."

In the case of *Loeser v. Dallas* (C. C. A. 3rd Circuit), 192 Fed. 909, it was held that, as between a district court in Ohio and a district court in the Western District of

Pennsylvania, the Court appointing the receiver had jurisdiction to settle the receiver's accounts, and that the receiver was not bound to account to the court of primary jurisdiction providing notice of the hearing of his accounts was given. The Court said:

> "The amendment of June 25, 1910, to the bankruptcy law, providing for ancillary proceedings in bankruptcy, simply recognized by statute a practice which courts in bankruptcy in pursuance of principles of equity and comity had theretofore generally exercised. In the nature of things an ancillary receiver must be subject alone to and obey the orders of that court of which he is an officer. So obeying, it follows that to it alone he must account. Any other course would breed confusion in administration and go far toward making the exercise of ancillary jurisdiction impracticable; but if a court in pursuance of comity undertakes to exercise ancillary jurisdiction by administering local assets which it alone has power and jurisdiction to administer, it follows that its hand must be free to administer by its own officer and to exact from him the full measure of duty. Such effective work it can only secure from an officer answerable to it alone. *Kirker v. Owings*, 98 Fed. 511, 39 C. C. A. 132; *Sands v. Neely*, 88 Fed. 133, 31 C. C. A. 424; *In re Isaacson*, 174 Fed. 406, 98 C. C. A. 614; *Ames v. U. P. Ry. Co.*, 60 Fed. 966. * * * As this petition has subjected the ancillary receiver to the expense of contesting the petition in this court, the court below is authorized to make such proper reimbursing allowance for such expense to the receiver from the funds in his hands as it deems proper. The order of the district court is affirmed with costs, and the record will be remanded with instructions to that court to allow said costs and a reasonable counsel

fee to the ancillary receiver's counsel for his services in this court, to be paid out of the balance of the monies appearing by his report to be in the hands of said receiver."

Loeser v. Dallas, supra.

Respecting the district courts and their respective territorial limits, the Circuit Court of Appeals for the 8th Circuit, in the case of *Fidelity Trust Co. v. Gaskell*, said:

"Under it these courts must appoint their own receivers, must guard them against wrongful action and consequent liability, and must direct the course that they must pursue. Conscience, good faith, and reasonable diligence alone must move courts of equity to action. They may not be divested of their judicial functions and made mere catspaws to do the will of private parties or public officers even by legislative action, much less by mere construction. * * * That Act and those decisions are that the district courts sitting in bankruptcy and consequently in equity have ancillary jurisdiction in bankruptcy proceedings pending in other districts."

Id.

"A court exercising ancillary jurisdiction acts independently of the court of primary jurisdiction or of its officers, and for itself. It appoints its own receiver, generally the same person appointed receiver by the court of primary jurisdiction, but in the seizure, management, sale and distribution of the property seized within the territorial limits of its district of which it takes the legal custody, this receiver is and must be governed by its orders exclusively."

Id., page 874.

Conclusion.

The order now complained of herein by appellant Jackson does not defy the Oklahoma court. It merely stays its own proceeding in order to complete administration before transmitting its own records to Oklahoma. Whether it is ultimately decided by the Tenth Circuit that California was the primary or secondary jurisdiction makes no difference as to the correctness of the instant correct order requiring the court's own officer to account to it.

It is respectfully submitted that the District Court for the Southern District of California made the only order which it was possible legally for it to make, and in this respect its order should be upheld and the appeal of P. M. Jackson, the Oklahoma trustee, should be dismissed. As was said in the case of *Loesser v. Dallas* (C. C. A. 2nd Cir.), 102 Fed. 909:

> "In the nature of things an ancillary receiver must be subject alone to and obey the orders of that court of which he is an officer. So obeying, it follows that to it alone he must account. Any other course would breed confusion in administration and go far toward making the exercise of ancillary jurisdiction impracticable; but if a court in pursuance of comity undertakes to exercise ancillary jurisdiction by administering local assets which it alone has power and jurisdiction to administer, it follows that its hand must be free to administer by its own officer and to exact from him the full measure of duty. Such effective work it can only secure from an officer answerable to it alone."

And again for the purposes of this brief, we adopt the language as expressed by the Circuit Court of Appeals for the Eighth Circuit in the case of *Fidelity Trust Co. v. Gaskell,* 195 Fed. 865, as follows:

> "A court exercising ancillary jurisdiction acts independently of the court of primary jurisdiction or its officers, and for itself. It appoints its own receiver, generally the same person appointed receiver by the court of primary jurisdiction, but in the seizure, management, sale and distribution of the property seized within the territorial limits of its district of which it takes the legal custody, this receiver is and must be governed by its orders exclusively."

The appeal should be dismissed. Mr. Lynch, the California receiver, as the long arm of the court of his appointment, should account, obey and attorn to the court for which he acts.

Respectfully submitted,

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